Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-1658
85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR EDISON ELECTRIC INSTITUTE *AMICUS CURIAE* IN SUPPORT OF APPELLEES

ROBERT L. BAUM*
JAN J. SAGETT

EDISON ELECTRIC INSTITUTE
1111-19th Street, N.W.
Washington, D.C. 20036
(202) 828-7679

**Counsel of Record*

August 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the Eleventh Circuit correctly ruled that the Pole Attachment Act, which authorizes the permanent physical attachment of cable television equipment to the property of an investor-owned (private) utility company, constitutes a taking of the utility company's property, for which the fifth amendment requires the payment of just compensation?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
INTEREST OF EDISON ELECTRIC INSTITUTE	1
COUNTERSTATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. Investor-Owned Utilities Are Entitled to Full Recognition of Their Constitutional Property Rights Under the Fifth Amendment	6
II. The Permanent Physical Attachment of Cable Television Equipment to Investor-Owned Utility Poles Constitutes a *Per Se* Taking	11
A. This Case Is Controlled by the Traditional *Per Se* Taking Rule Reaffirmed in *Loretto*	11
B. The Permanent Physical Taking Allowed Under the Pole Attachment Act Is Indistinguishable from *Loretto*	14
C. The Private Property Rights at Issue in this Case Are Indistinguishable from the Private Property Rights Upheld in *Loretto*	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Alabama Power Co. v. FCC, 773 F.2d 362 (D.C. Cir. 1985) 14

Block v. Hirsh, 256 U.S. 135 (1921) 17

Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23 (1926) 8

Bowles v. Willingham, 321 U.S. 503 (1944) 17

Central Telecommunications, Inc. v. TCI Cablevision, Inc., 610 F. Supp. 891 (W.D. Mo. 1985) 5

City of Los Angeles v. Preferred Communications, Inc., slip op. No. 85-390 (June 2, 1986) 14

Connolly v. Pension Benefit Guaranty Corp., 106 S. Ct. 1018 (1986) 13

Consolidated Edison v. Public Service Commission, 447 U.S. 530 (1980) 10

Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) 17

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 17

Florida Power Corp. v. FCC, 772 F.2d 1537 (11th Cir. 1985) (per curiam) ..... *passim*

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 17

Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934) 17

ICC v. Oregon-Washington Railroad & Navigation Co., 288 U.S. 14 (1933) 8

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 12, 13

Table of Authorities-Continued

	Page
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	*passim*
MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986)	13
Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, 262 U.S. 276 (1923)	8
Pacific Gas & Electric Co. v. Public Utilities Commission, 106 S. Ct. 903 (1986)	10
Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)	13
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	13
Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946)	17
San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981)	12
Texas Power & Light Co. v. FCC, 784 F.2d 1265 (5th Cir. 1986)	18
United States v. Causby, 328 U.S. 256 (1946)	12
United States v. General Motors Corp., 323 U.S. 373 (1945)	12
United States v. Petty Motor Co., 327 U.S. 372 (1946)	12
Western Union Telegraph Co. v. Pennsylvania Railroad Co., 195 U.S. 540 (1904)	8
ADMINISTRATIVE DECISIONS:	
David Bailey d/b/a Port Gibson Cable TV v. Mississippi Power & Light Co., FCC Mimeo No. 36118 (Sept. 11, 1985)	15
Tele-Communications, Inc. v. South Carolina Electric & Gas Co., FCC Mimeo No. 3994 (Apr. 19, 1985)	15

Table of Authorities-Continued

	Page
Teleservice Corp. of America v. Southwestern Public Service Co., No. PA-79-0010 (FCC July 17, 1981)	4
Television Cable Service, Inc. v. Monongahela Power Co., 88 F.C.C.2d 56 (1981)	4
Whitney Cablevision v. Southern Indiana Gas & Electric Co., FCC Mimeo No. 841 (Nov. 16, 1984)	15
CONSTITUTIONAL PROVISIONS AND STATUTES:	
U.S. Const. amend. I	10
U.S. Const. amend. V	*passim*
Pole Attachment Act (Communications Act Amendments of 1978), Pub. L. No. 95-234, § 6, 92 Stat. 33 (codified as amended at 47 U.S.C. § 224 (1982 & Supp. III 1985))	*passim*
§ 224(a)(1)	1
§ 224(d)	3
MISCELLANEOUS:	
Leepson, *Cable Television: Coming of Age*, Vol. II, No. 24 Congressional Quarterly Editorial Research Reports 967 (Dec. 27, 1985)	4
Michelman, *Property, Utility, & Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967)	12
National Association of Broadcasters, *Great Expectations: A Television Manager's Guide to the Future* (Apr. 1986)	4
Television Digest (May 1985)	4

INTRODUCTION

The Edison Electric Institute (EEI) supports Appellees Florida Power Corporation, Tampa Electric Company, Mississippi Power & Light Company, Alabama Power Company, and Arizona Public Service Company in seeking affirmance of the decision of the Eleventh Circuit that the Pole Attachment Act (Communications Act Amendments of 1978), Pub. L. No. 95-234, § 6, 92 Stat. 33 (codified as amended at 47 U.S.C. § 224 (1982 & Supp. III 1985)), is unconstitutional.[1]

INTEREST OF EDISON ELECTRIC INSTITUTE

EEI is the national association of investor-owned electric utility companies in the United States. Its 176 members serve approximately 96 percent of all customers served by the investor-owned segment of the industry. They generate about 75 percent of all electricity in the country, and service 73 percent of all ultimate electric utility customers in the nation.

The Pole Attachment Act applies only to investor-owned utilities. 47 U.S.C. § 224(a)(1).[2] Many EEI member companies are subject to the jurisdiction of

---

[1] The written consents of all parties to the filing of this brief have been filed with the Clerk of this Court, pursuant to Sup. Ct. R. 36.

[2] Investor-owned electric utility companies, as distinct from municipal (public) electric utility companies and rural electric cooperatives, and like private businesses, issue stock to shareholders. Of course, investor-owned utility companies are subject to regulation in the provision of electric utility service to the public, including limits on the rate of return to investors. Investor-owned utility companies own property in the name of the utility company, and enjoy property rights like any other corporation.

the Federal Communications Commission (FCC) under the Act. The Act confers authority on the FCC to regulate the rates, terms and conditions of cable television attachments to the utility poles owned by those investor-owned utility companies that are not regulated in this regard by the states. EEI members own and control millions of poles necessary for the transmission and distribution of electric energy to their customers or ratepayers. Private cable television operators have found it to be economically expedient to use a substantial number of these poles for the purpose of attaching cables, amplifiers, power supplies, grounds, guys, anchors and other equipment used in the provision of cable television service.

Under the aegis of the Pole Attachment Act, the FCC repeatedly has authorized cable television companies to occupy space on utility poles owned by EEI members, and paid for by investors and ratepayers, at rates drastically lower than contracted for by the cable operators and the utilities. For example, in this case, rates per pole negotiated by Appellee Florida Power Corporation of $7.15, $5.50, and $6.24 each were reduced by the FCC to $1.79 per pole—reductions of 75 percent, 71 percent, and 62 percent, respectively. *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1541 (11th Cir. 1985) (J.S. App. 1a, 7a).[3]

EEI member companies have a substantial interest in supporting the Eleventh Circuit's rejection of this unconstitutional regulatory scheme, as representatives of both the right of utility company investors to be

---

[3] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Federal Communications Commission and the United States of America in No. 85-1658.

free from the uncompensated taking of their property and the right of utility ratepayers to avoid a forced subsidy of cable television investors and customers.

COUNTERSTATEMENT OF THE CASE

There are approximately 215 investor-owned electric utilities in the country providing electric utility service to over 77 million customers.[4] The rates electric utility customers pay for this service and the rate of return to the utility's shareholders are regulated by government authorities. To the extent investor-owned utilities are prohibited by federal law from receiving full compensation for the use of their property by virtue of the Pole Attachment Act, the utility company investors and utility ratepayers are forced to subsidize the cost of cable transmission.

Utility poles are owned, operated, maintained and used by investor-owned utilities for providing electricity. Cable companies have entered into contracts with investor-owned utilities allowing the cable companies to use these valuable utility poles. The contractually agreed-upon cable pole attachment rates have been reduced, however, based on rate prescriptions by the FCC using a formula set out by federal statute. 47 U.S.C. § 224(d).[5]

---

[4] The number of utility customers is based on the number of meters, or accounts, and includes commercial as well as residential customers. Some multistory dwellings may not be separately metered, however. Therefore, this number does not necessarily reflect the number of separate residential households receiving electric utility service.

[5] Drastic reductions by the FCC in contractually established pole attachment rates have been commonplace. The FCC his-

The customers served by investor-owned utilities pay for and receive electricity, a necessity of modern life. In contrast, subscription to cable television entertainment service is a matter of choice. Many electric utility ratepayers do not elect to subscribe to cable, *e.g.*, commercial establishments, residential utility ratepayers who own satellite dishes, or people who object to certain cable programming selections. Only about 41 percent of all television households[6] currently subscribe to cable,[7] and only about 55 to 57 percent of homes with access to cable elect to subscribe.[8] Electric utility ratepayers, as a result, subsidize the cost of cable service for those choosing to subscribe insofar as pole attachment rates are kept artificially low.

---

torically has sharply reduced rates previously agreed to by cable operators under the Pole Attachment Act. *See, e.g., Television Cable Serv., Inc. v. Monongahela Power Co.*, 88 F.C.C.2d 56 (1981) (per pole contract rates of $7.17 and $8.16 reduced to $1.46); *Teleservice Corp. of America v. Southwestern Pub. Serv. Co.*, No. PA-79-0010 (FCC July 17, 1981) (per pole contract rates of $5.00 and $4.00 reduced to $.90). Moreover, in this case, the FCC reduced the Group W and Acton CATV contract rates below what the cable companies requested.

[6] Television households are simply the number of U.S. households equipped with at least one television set. There were approximately 86.4 million TV households, compared to 34 to 40 million cable households, as of the end of 1985. National Association of Broadcasters, *Great Expectations: A Television Manager's Guide to the Future* 11, 19 (Apr. 1986) [hereinafter cited as NAB Report].

[7] Leepson, *Cable Television: Coming of Age*, Vol. II, No. 24 Congressional Quarterly Editorial Research Reports 967 (Dec. 27, 1985) (citing *Television Digest* (May 1985)).

[8] NAB Report, *supra* note 6, at 20.

Cable operators normally must obtain a franchise agreement with a municipal authority which permits them to offer cable television service in the franchise area. Most franchising authorities select one cable operator to provide cable service in a given area, and the selected cable operator usually enjoys a monopoly position relative to the provision of cable television service in that area. *See Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 899–900 (W.D. Mo. 1985). Cable operators pay a fee to the franchising authority for the cable franchise, and pass on the costs of providing cable service to cable subscribers.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly ruled that the Pole Attachment Act, 47 U.S.C. § 224, which authorizes the permanent physical attachment of cable television equipment to the property of investor-owned utility companies, constitutes a taking of that property in violation of the fifth amendment.

Investor-owned utilities are entitled to full recognition of their constitutional property rights. These rights are in no way diminished by the use of the property to provide electricity or by the accompanying government regulation of such use. Under the fifth amendment, the private property of an investor-owned utility may not be taken for use by cable television companies or any other entity without the payment of just compensation.

This case is controlled by the traditional *per se* taking rule applicable to permanent physical occupation of property applied by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419

(1982). The Pole Attachment Act, like the statute struck down by the Court in *Loretto*, allows cable television companies to attach cable equipment to private property without providing just compensation as required by the fifth amendment. Neither the character of the permanent physical taking nor the private property rights at issue distinguish this case from *Loretto*.

Appellants and their *Amici* essentially are asking the over 77 million electric utility ratepayers to subsidize the cable television industry and those who have chosen to receive their service. The Eleventh Circuit's rejection of this untenable proposition is in complete accordance with this Court's decision in *Loretto* and should be affirmed.

ARGUMENT

I. Investor-Owned Utilities Are Entitled to Full Recognition of Their Constitutional Property Rights Under the Fifth Amendment.

The property of investor-owned utilities used to provide electricity is private property within the protection of the fifth amendment to the United States Constitution. The fifth amendment requires the payment of just compensation when private property is taken for a public use. U.S. Const. amend. V. Accordingly, a governmentally authorized taking of the property of an investor-owned utility is constitutional only on the payment of just compensation.[9]

---

[9] EEI is not specifically addressing the issue of whether the Pole Attachment Act fails to provide for the determination of just compensation required by the fifth amendment. EEI adopts the position taken on this issue by the Appellees.

The arguments of both the Federal and Cable Appellants essentially suggest that investor-owned utilities do not have private property rights in their utility poles. There simply is no support for this position.[10]

The Appellants rest their case for a utility exception to the fifth amendment on the facts that the utility poles are used to provide a public utility service and that investor-owned utility companies are regulated by government authorities in their provision of utility service.[11] Group W Brief at 16, 18–20; Federal

---

[10] Notwithstanding their arguments for a utility exception to the taking clause, the Cable Appellants acknowledge that some "utility property can, of course, be the subject of an unconstitutional taking." *See* Group W Cable, *et al.* [hereinafter cited as Group W] Brief at 22 n.51. The Cable Appellants fail to distinguish between the utility property they admit is protected by the fifth amendment and utility poles, except on the basis that cable companies have a present economic interest in using the poles. *Id.* The interest of the party for whose benefit private property is taken does not remove the constitutional requirement of just compensation to the property owner.

[11] The Federal Appellants argue that the utility companies "simply object to the regulation of rates they charge for permitting an additional set of wires to be strung on poles they themselves use for *precisely that purpose, and only for that purpose.*" Federal Appellants' Brief at 14 (emphasis added). In fact, the utility companies use their poles for a wholly distinct purpose (provision of electricity) from the purpose for which the cable companies seek access (provision of television entertainment). The distinction is not insignificant. Even assuming that utility company property is dedicated to a public use, such dedication is to the company's basic utility service. The Pole Attachment Act allows for uncompensated physical access for provision of enhanced television service, a function totally unrelated to providing electricity.

Appellants' Brief at 13–14. This Court previously has held with respect to the constitutional protection afforded to private property devoted to a public rather than a private use that "[t]here is no difference whatever in principle arising from the difference in the uses." *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U.S. 540, 570 (1904). Western Union had argued that the railroad could not require it to remove its poles and wires from the railroad right-of-way because the right-of-way was "property devoted to a public use." *Id.* at 573. The Court agreed that the railroad property was devoted to a public use, but held that, nonetheless, the right-of-way was protected from a taking without just compensation under the fifth amendment.[12]

The Court consistently has held that neither government authorities as regulators of utility services nor the public as consumers of such services are entitled to any interest in the property of investor-owned utility companies that is used to render such services.[13] Surely, cable operators cannot be entitled to the right to physically occupy utility company prop-

---

[12] *Accord ICC v. Oregon-Washington R.R. & Nav. Co.*, 288 U.S. 14, 40–41 (1933) (despite the fact that railroads are dedicated to public use, they are the private property of their owners and their assets cannot be taken without just compensation).

[13] *See Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 262 U.S. 276, 289 (1923) ("It must never be forgotten that while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general powers of management incident to ownership.") and *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 32 (1926) ("By paying bills for service [ratepayers] do not

erty free from constitutional limitations when neither government authorities nor ratepayers could assert such a right. Moreover, were the Court now to hold that utility property belongs to the government, to the ratepayers, or to any other members of the public at large (such as the cable operators), the untenable result would be that *any* industry which provides public services and is regulated for public policy reasons—including the cable industry—no longer would have protected rights in its property.

Extending the Appellants' argument to its logical conclusion, the government could order utility companies to make the following utility company property available to the public: extra office space; conference rooms during times when they are not otherwise in use; computers, photocopiers or other equipment when not otherwise in use, etc. Such intrusive uses of utility-owned property cannot be justified based on the fact that the property is used in the provision of electricity to the public and is subject to government regulation in connection with that use. As the Cable Appellants recognize, Group W Brief at 22 n.51, there is no precedent for the proposition that an investor-owned company denudes itself of fifth amendment protection by using its property for a utility service. Yet this is the logical terminus of the Appellants' argument.

A determination that investor-owned utility companies have no fifth amendment rights against the uncompensated taking of their property by cable companies would be inconsistent with the decisions of this

---

acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.").

Court recognizing the constitutional rights of utilities in other contexts. As Justice Marshall stated in his concurring opinion in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 106 S. Ct. 903, 915 n.1 (1986):

> That the utility passes on its overhead costs to ratepayers at a rate fixed by law rather than the market cannot affect the utility's ownership of its property, nor its right to use that property for expressive purposes, see *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 534 n. 1, 100 S.Ct. 2326, 2331 n. 1, 65 L.Ed.2d 319 (1980).

Expanding on the precedent of *Consolidated Edison*, the Court found in *Pacific Gas & Electric* that the regulated status of a utility company does not lessen its right to be free from state regulation that burdens its speech. 106 S. Ct. at 912 n.4 (1986). Implicit in both the plurality and the concurring opinions in *Pacific Gas & Electric* is the principle that utility companies have private property rights in their billing envelopes. 106 S. Ct. at 910 n.8, 912, 913, 914 (Burger, C.J., concurring); 915 n.1, 917 (Marshall, J., concurring). *A fortiori*, investor-owned utility companies have private property rights in their utility poles as well.[14]

---

[14] *Amici* Nor-West Cable Communications and Preferred Communications, Inc. argue, Brief at 11–16, that the Eleventh Circuit's decision will result in restraining the first amendment rights of the cable companies. To the extent that first amendment rights of the cable companies might even come into play in this case, however, they do not justify taking electric utility property without just compensation.

II. The Permanent Physical Attachment of Cable Television Equipment to Investor-Owned Utility Poles Constitutes a *Per Se* Taking.

A. This Case Is Controlled By the Traditional *Per Se* Taking Rule Reaffirmed in *Loretto*.

The Eleventh Circuit's decision falls squarely within the parameters of the traditional *per se* rule of the fifth amendment, reaffirmed by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.* that "a permanent physical occupation *is* unquestionably a taking." 458 U.S. 419, 435 n.12 (1982) (emphasis in original).[15] Inasmuch as the fifth amendment applies with full force to the private property of an investor-owned utility, as discussed above, there is no need for the Court to look beyond *Loretto* in deciding whether the Pole Attachment Act effects a compensable taking.[16]

In analyzing property rights under the fifth amendment, this Court has adopted a "bundle of rights" approach, which includes, *inter alia*, the rights to possess, use and dispose of property, and the right

---

[15] As the Court stated in *Loretto*, "the character of the [physical] invasion is qualitatively more intrusive than perhaps any other category of property regulation." 458 U.S. at 441. The Court's decision in *Loretto* did not break any new ground, but merely recited the traditional rule that in cases involving a permanent physical occupation, a taking always has been found. *See id.* at 427-28, 435, 441.

[16] The facts in *Loretto* are indistinguishable from the facts in this case. In *Loretto*, the Court held that a New York law requiring property owners to permit attachment of cable television equipment to their property constituted a compensable taking.

to exclude others from using the property.[17] As the Court recognized in *Loretto*, "[t]o the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights." 458 U.S. at 435 (emphasis in original). The Court noted:

> The one incontestable case for compensation . . . seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.

Id. at 427 n.5, (quoting Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) (footnote omitted)); *see also United States v. Causby*, 328 U.S. 256, 266–67 (1946); *United States v. Petty Motor Co.*, 327 U.S. 372, 374–75, 384–85 (1946); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 657–59 (1981) (Brennan, J., dissenting).

In *Loretto*, the Court reaffirmed "the rule that a permanent physical occupation is a government action of such unique character that it is a taking without regard to other factors that a court might ordinarily examine." 458 U.S. at 432. The Court held:

> [W]hen the physical intrusion reaches the extreme form of a permanent physical occupation, . . . "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is *determinative*.

---

[17] *See, e.g., Loretto*, 458 U.S. at 433, 435; *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); and *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

Id. at 426 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)) (emphasis added).

A permanent physical occupation of private property, authorized by government action, universally is considered to be a compensable taking under the fifth amendment without regard to the public benefit of the occupation or the extent of the economic impact on the property owner. *Id.* at 435–36. Those factors are considered only in the more difficult cases involving an alleged taking through some nonpossessory (*i.e.*, nonphysical or temporary) regulation or use, to which the protection of the fifth amendment has been extended.[18] In this case, as in *Loretto*, a physical invasion of property is at issue.[19] Thus, it was not only proper, but indeed required under principles of *stare decisis*, for the Eleventh Circuit to follow *Loretto* in

---

[18] The multifactor balancing test referred to in the cases cited by Appellants, Group W Brief at 23 n.53, only applies to takings which do not involve a permanent physical invasion of private property. *See, e.g., Connolly v. Pension Benefit Guar. Corp.*, 106 S. Ct. 1018 (1986) (unsuccessful fifth amendment challenge to provisions of statute governing multi-employer pension plans which nullified a contractual provision limiting liability); *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986) (compensable taking not established in case involving rejection by a planning commission of a proposal to subdivide real property into lots); and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (no violation of fifth amendment property rights when public was given temporary access to shopping center to exercise protected first amendment right of free speech).

[19] As in *Kaiser Aetna v. United States*, 444 U.S. at 179–80, this is not a case in which the government merely is exercising regulatory power, but rather involves physical invasion of property by the government.

reaching the conclusion that the Pole Attachment Act allows an unconstitutional taking.

B. The Permanent Physical Taking Allowed Under the Pole Attachment Act Is Indistinguishable from *Loretto*.

As the Eleventh Circuit properly recognized, "*Loretto* and the instant case are virtually indistinguishable; they both involve the placement of plates, boxes, wires, bolts and screws upon the property of a reluctant owner." J.S. App. at 14a. At least one other court simply assumed that the physical attachment of such cable equipment to utility property "is clearly a taking" under the authority of *Loretto*. *Alabama Power Co. v. FCC*, 773 F.2d 362, 367 n.8 (D.C. Cir. 1985) (vacating the FCC's decision that pole attachment rates of electric utility companies were excessive; and noting, without reaching the issue, that the physical attachment of cable equipment to the utility poles would be a taking under *Loretto*).

Appellants attempt to avoid the result mandated under *Loretto* by asserting that, although the utility company's poles are physically occupied by the cable television equipment, the space occupied by cable may be reclaimed by Florida Power under the terms of the pole attachment contracts if the space is required for utility service. Group W Brief at 24–28; Federal Appellants' Brief at 15–18. This argument assumes that the utility company will be allowed to enforce its contractual arrangements.[20] In fact, as the Eleventh Circuit stated, "the FCC has made it quite clear

---

[20] Notwithstanding their assertions in this case, the cable companies argued in *City of Los Angeles v. Preferred Communications, Inc.*, slip op. No. 85-390 (June 2, 1986), that access to utilities' poles may not be limited, at least by the government.

that it intends to require continued provision of space at FCC—ordered rates." J.S. App. at 12a. Unlike the property owner in *Loretto*, who could have forced the cable company to disconnect at any time by occupying the building herself or by converting it to a commercial property, it is a virtual certainty that the utility company will not be permitted by the FCC to disconnect cable attachments on the basis of any contractual provisions. *See id.* (citing *Loretto*, 458 U.S. at 439 & n.17).[21] Thus, as the Eleventh Circuit held, "the extent of the occupation in the case of Florida Power not only satisfies *Loretto's* permanency requirement, but significantly exceeds it." J.S. App. at 13a.

The fact that, as an initial matter, investor-owned utility companies voluntarily entered into contracts with cable companies does not in any way detract from the conclusion that there has been a permanent physical taking of property for which just compensation is due. Access voluntarily granted at a nego-

---

[21] The FCC has ruled uniformly that utilities may not refuse to permit cable operators to continue to occupy space on poles owned and operated by the utilities for provision of electricity. *See, e.g., Whitney Cablevision v. Southern Indiana Gas & Elec. Co.*, FCC Mimeo No. 841 (Nov. 16, 1984); *Tele-Communications, Inc. v. South Carolina Elec. & Gas Co.*, FCC Mimeo No. 3994 (Apr. 19, 1985). In one case, *David Bailey d/b/a Port Gibson Cable TV v. Mississippi Power & Light Co.*, FCC Mimeo No. 36118 (Sept. 11, 1985), the FCC ruled that a utility must expand its facilities to make room for initial attachments by a new cable operator. The mere recitation of the facts in the *Port Gibson* case by the Federal Appellants in no way supports their bare assertion that the FCC has not attempted to limit the utilities' power to terminate pole attachment contracts. Federal Appellants' Brief at 16–17.

tiated rate no longer can be considered voluntary at the substantially reduced rate imposed under the Pole Attachment Act.[22] As the Eleventh Circuit recognized:

> [B]y insisting on a significantly lower rate, the cable companies have themselves transformed their status from that of an invitee, to use their own terms, to that of an unwanted guest. While they may have been invited at the outset, they certainly weren't invited at the rate imposed by the FCC.

J.S. App. at 10a–11a. Moreover, in *Loretto* the cable company also had routinely entered into agreements with property owners for the initial attachment of cable equipment to the property. 458 U.S. at 423.[23] Thus, the alleged distinction between the two cases is simply a red herring.

C. The Private Property Rights at Issue in this Case Are Indistinguishable from the Private Property Rights Upheld in *Loretto*.

Utility rate regulation, like the rent control applicable to the apartment building in *Loretto*, does not in any way abrogate the applicable fifth amendment rights of investor-owned utilities. The issue before the Court is not, as the Appellants would have the Court believe, whether government authorities will be able to continue regulating utility rates and services if

---

[22] By allowing the cable companies to attach their cables at a rate substantially below the agreed-upon contract rate, the statute provides a windfall for the cable companies.

[23] Under those agreements, property owners had been compensated at a standard rate of five percent of gross revenues realized by the cable company from the particular property. 458 U.S. at 422–23.

investor-owned utilities are found to have fifth amendment rights, just as the issue in *Loretto* was *not* whether states would be able to continue regulating housing conditions or landlord/tenant relationships. *See* 458 U.S. at 440.

In *Loretto*, this Court distinguished cases involving state regulation of housing conditions or landlord/tenant relationships based on the fact that such regulations do not authorize the permanent occupation of the landlord's property by a third party. *Loretto*, 458 U.S. at 440 (distinguishing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) (*overruled* subsequent to the *Loretto* decision in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983)); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); and *Block v. Hirsh*, 256 U.S. 135 (1921)). The Court here also can distinguish the utility rate cases cited by Appellants and their *Amici* on similar grounds: utility rate regulation does not authorize the permanent occupation of utility property by a third party.[24]

---

[24] EEI disagrees with the Federal Appellants' unsupported and confusing claim that regulation of the rates charged to the cable companies by investor-owned utilities "would be no less consistent with the Just Compensation Clause than is any other component of the state rate regulation scheme." Federal Appellants' Brief at 11. The fact that investor-owned utilities are subject to rate regulation *for selling electricity* is not relevant to the question of whether there is a compensable taking when the government authorizes the permanent occupation of the utility's property by a third party. Accordingly, cases cited by

Without any basis for distinguishing *Loretto*, Cable Appellants and their *Amici* attempt to ride the backs of the ratepayers, arguing that, regardless of whether the cable companies justly compensate investor-owned utilities for their occupation of the utility poles, the utilities will be made whole by the ratepayers. *See* Group W Brief at 23, and *Amicus* Texas Cable TV Association, Inc., *et al.*, Brief at 11. This argument misconceives the issue before the Court. The issue is not whether regulation provides utilities an opportunity to earn a fair return on investment from the ratepayers, but whether a physical taking of private utility property by the cable industry requires just compensation.[25] This is the precise question which was before the Court in *Loretto* and which was answered in the affirmative.

Appellants (Group W Brief at 22 n.51, Federal Appellants' Brief at 9–10) to support the proposition that fifth amendment taking claims by utilities have been rejected when the utility rates assure a nonconfiscatory return have no applicability to this case.

[25] In *Texas Power & Light Co. v. FCC*, 784 F.2d 1265, 1272 (5th Cir. 1986), the Fifth Circuit rejected Group W's argument that the utility company would, in any case, receive a fair return from utility ratepayers, as if that somehow justified passing on costs to the ratepayers so that cable television companies can benefit.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Edison Electric Institute respectfully urges the Court to affirm the decision of the Eleventh Circuit.

Respectfully submitted,

ROBERT L. BAUM*
JAN J. SAGETT

Edison Electric Institute
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 828-7679

**Counsel of Record*

August 1986